SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1414

ROBERT J. BEAUDRY,
Petitioner,

vs.

STATE OF WISCONSIN,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

Page

CITATION TO OPINION BELOW 1

JURISDICTION 2

QUESTION PRESENTED 3

REASONS FOR DENYING THE WRIT 4

I. The Standards Utilized By The Wisconsin Supreme Court In Measuring The Petitioner's Professional Misconduct Are Neither Vague Nor Uncertain 4

II. The Wisconsin Supreme Court Indulged In No Presumption To The Effect That A Lawyer Cannot Function In A Competent Manner And Render Independent Professional Service Because He Has Been Requested To Render Legal Services To A Client Of A Lawyer Friend 7

III. The Findings Of Fact By The Wisconsin Supreme Court In An Original Action In That Court Are Not Subject To Review Here If Supported By The Record 11

CONCLUSION 12

Page

AUTHORITIES CITED

State v. Beaudry (1971),
53 Wis. (2) 148, 191 NW (2) 842 2,4,9,10

State v. Collentine (1968),
39 Wis. (2) 325, 159 NW (2) 50 4,6

State v. Eisenberg (1965),
29 Wis. (2) 233, 138 NW (2) 235 4,6

State v. Haberla (1968),
39 Wis. (2) 334, 159 NW (2) 11 4,6

State v. Horan (1963),
21 Wis. (2) 66, 123 NW (2) 488 4

In re Lobb's Will (1944),
173 Or. 414, 145 P (2) 808 10

In re Sawyer (1959),
360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed. (2) 1473 11

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The State of Wisconsin, Respondent, by its attorneys Robert H. Bichler and Warren H. Resh, present this brief in opposition to the granting of the Petition for Writ of Certiorari to the Supreme Court of Wisconsin by Robert J. Beaudry, Petitioner.

OPINION BELOW

The judgment of the Supreme Court of the State of Wisconsin which the Petitioner seeks to have reviewed was entered on December 2, 1971, and is officially reported in

53 Wis. (2) 148, and unofficially in 191 NW (2) 842. It is printed in the Petition herein as Appendix B, p. 24a. Motion for rehearing was denied by the Wisconsin Supreme Court on February 1, 1972. (See Appendix C, p. 33a of the Petition herein.)

JURISDICTION

The Respondent raises no question as to the jurisdiction of this court to consider a Petition for Writ of Certiorari in attorney disciplinary proceedings involving alleged violation of constitutional rights under the United States Constitution.

What the Petitioner is really seeking to attack here are the conclusions of the Wisconsin Supreme Court, and it is strongly urged that no constitutional rights of the Petitioner were violated as clearly appears in the decision and judgment of that court as amply supported by the record herein.

QUESTION PRESENTED

Was a lawyer denied due process and equal protection of the law in an original disciplinary action in the State Supreme Court wherein the lawyer was reprimanded and censured for unprofessional conduct for his part in arranging for the drafting of a will of a feeble illiterate 75 year old testatrix on her deathbed when under the terms of the will such lawyer was named practically the sole beneficiary, and the only son of the testatrix was disinherited, and such will was drafted by a close associate of the attorney-beneficiary with such scrivener being briefed by the beneficiary on the way to the hospital as to the contents of the proposed will and such scrivener made little or no attempt to counsel the testatrix or to give her independent legal advice?

REASONS FOR DENYING [redacted]IT

I. The Standards Utilized By The Wisconsin Supreme Court In Measuring The Petitioner's Professional Misconduct Are Neither Vague Nor Uncertain.

The Petitioner contends that the standards utilized by the Wisconsin Supreme Court in measuring his professional misconduct were vague and uncertain.

On this point the Wisconsin Supreme Court said in its opinion, 53 Wis. (2) 148, 156, reprinted in the Petition herein at p. 31a:

> "We have been asked to lay down precise guidelines for attorneys to draft wills in which they are to be named beneficiaries. This request presupposes the present cases on the subject are not adequate; we think they are and the basic, general rule is, it should not be done. If the attorneys will read our prior cases on this subject/[1] with an unbiased eye, they will find adequate guidelines. An attorney who sees how close he can come at the line of demarcation always runs the risk of overstepping."

In *Horan, supra,* it was held that an attorney has no right to jeopardize the performance of his duties or the confidence, approval, and esteem of the public which the legal profession has traditionally enjoyed. He has a duty not to harm the integrity of the legal profession even though this may call for a personal sacrifice or the omission of acts which are not intrinsically bad. Also his duty of fidelity to his client involves

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[1]/ *State v. Horan* (1963), 21 Wis. (2) 66, 123 NW (2) 488
State v. Eisenberg (1965), 29 Wis. (2) 233, 138 NW (2) 235
State v. Collentine (1968), 39 Wis. (2) 325, 159 NW (2) 50
State v. Haberla (1968), 39 Wis. (2) 334, 159 NW (2) 11.

more that refraining from exercising undue influence *and that the client has a right to full and disinterested advice.*

The failure of the Petitioner here to see that his client, the testatrix, received full and disinterested advice in the drafting of a will in which he was to be named as the principal beneficiary with her only son to be disinherited is the crux of the case.

To avoid the appearance of impropriety the Petitioner employed an attorney who was unknown to the testatrix and who had but little experience in will drafting. The drafting attorney was a close associate of the Petitioner and after being solicited to draw the will was told by the Petitioner on the way to the hospital what the provisions of the will would be. Without any instructions to do so on the part of the testatrix the will was turned over to the Petitioner by the draftsman, and as the Referee found:

> "I believe that there can be no doubt that the friendly relationship between Beaudry and Balistrieri, the fact that the scrivener was informed on the way to the hospital as to what the nature of the will would be, the eagerness with which Beaudry examined the will before the scrivener even entered the car, and all of the circumstances of the execution, indicate that Mr. Balistrieri was not in fact acting as the attorney for Mrs. Komarr, but was acting as the attorney, friend and agent of Beaudry." (See p. 19a of Petition herein)

In other words this is not a case of measuring misconduct by vague and uncertain standards.

Rather it is a question of whether or not the facts established in the record sustain the findings of the Referee which findings were adopted by the Wisconsin Supreme Court.

In *Eisenberg, supra,* there was a will which was unnatural on its face in that an only child was disinherited, and the estate was willed to the offending attorney's mother. The court there found an inference of undue influence under the circumstances and reprimanded the attorney.

In *Collentine, supra,* it was pointed out that when a testator wishes to have his attorney draft a will in which the attorney is entitled to anything more than he would be at law, it is the absolute duty of the attorney to refuse to act and that he has the responsibility of advising the client to consult another attorney. Obviously this must mean another attorney who will owe his undivided allegiance and loyalty to the client and who is not acting as the attorney, friend, and agent of the attorney-beneficiary.

Haberla, supra, completes the above list of cases supplied by the Wisconsin Supreme Court and furnishes ample guidance for all who will read.

In *Haberla* the attorney was the guardian of a 74 year old widower to whom he was unrelated, and the attorney drafted a will dividing the estate between himself and another client also unrelated to the decedent. He was evidently aware of the conflict of interests and breach of fiduciary relationships involved because he took the precaution of having a student type the document and append a statement thereto to the effect that the student had drafted the will.

About the only distinction between that case and the instant one is that here the Petitioner instead of using a student prevailed upon an attorney friend and associate to prepare the document and to act as a witness along with his sister after the Petitioner had briefed them on the way to the hospital to the effect that he was to be the beneficiary and that the testatrix's only son was to be disinherited.

Thus the difference between *Haberla* and the instant case is one of limited degree only and certainly not one of principle, and as was pointed out by the Wisconsin Supreme Court in its opinion here, an attorney who sees how close he can come to the line of demarcation always runs the risk of overstepping. We are not dealing here with some illiterate and underprivileged defendant in a criminal case and to accept the argument of Petitioner to the effect that the standards applied to him were either vague or uncertain is to presume a childlike naivete and artless simplicity utterly foreign to a sophisticated and widely experienced lawyer such as the Petitioner.

II. The Wisconsin Supreme Court Indulged In No Presumption To The Effect That A Lawyer Cannot Function In A Competent Manner And Render Independent Professional Service Because He Has Been Requested To Render Legal Services To A Client Of A Lawyer Friend.

The second argument raised by the Petitioner seeks to convict the Wisconsin Supreme Court of having adopted a presumption that when an attorney who knows that he should not draw a will in which he is to be the beneficiary is precluded from referring the matter to an attorney who happens to be his friend for the reason that such friendship will prevent the second attorney from functioning in an independent and competent manner.

There is absolutely no basis for inferring that the Wisconsin Supreme Court indulged in any such presumption. The decision here is based solely on the facts in the record and not on presumptions.

Any practicing lawyer of extended experience has been confronted with situations wherein he is disqualified from acting because of a conflict of interests and who at the request of the client refers the matter to another attorney who happens to be a friend of the first attorney.

Friendship is not the governing criterion but rather the propriety of what follows depends upon whether the second attorney actually gives his independent advice and undivided loyalty and allegiance to the client rather than to the attorney intermediary who referred the matter to him and who briefed him on what was to be done.

Here in addition to the briefing which Attorney Balistrieri received from the Petitioner on the way to the hospital to the effect that the testatrix wanted the Petitioner to be her beneficiary and wanted to disinherit her only son the Referee states at pp. 10-11 of the Record, State Supreme Court Appendix, p. 109, that:

> "This relationship between the defendant and Mr. Balistrieri leads naturally to the question: In drafting and procuring the execution of the will, was Balistrieri acting as the attorney for Mrs. Komarr or for Mr. Beaudry?
>
> "It will be noted that during this interview with Mrs. Komarr, Balistrieri made no effort to probe the reason why she wished to disinherit her son, nor to inquire as to other relatives to whom she might wish to leave bequests. He apparently accepted without question the statement

which he claims she made that that she wished Mr. Beaudry to have everything, since he had been preconditioned to that response by the information given him by Mr. Beaudry.

"It is my opinion that the adage qui fact per alium, facit per se applied under the circumstances, and Mr. Balistrieri was obviously acting as the agent of Mr. Beaudry, who was eagerly waiting in the wings for the little drama to be completed."

Moreover as the Wisconsin Supreme Court points out in 53 Wis. (2) 148, 153, Mr. Balistrieri handed the completed will to the Petitioner, although he had not been instructed to do so by the testatrix and the Petitioner immediately examined it and thereafter kept it in his possession until it was offered for probate, adding:

"The referee was of the opinion, and we think rightly so, that Mr. Balistrieri acted as a scrivener for Beaudry and not as an independent attorney for Mrs. Komarr. It is the duty of an attorney, who selects another attorney to draw a will for his client in which he is to be a beneficiary, to pick out as competent and as independent an attorney as the client would pick out. Consequently, it was the duty of Mr. Beaudry to instruct Mr. Balistrieri he was to act as an independent attorney for Mrs. Komarr with no obligations to him and ascertain from her by specific inquiry what her intentions were, the natural objects of her bounty, the value of her property, and all other matters which would be pertinent to her testamentary capacity to make a will and her intentions for the disposition of her property. This is especially important in this case because Mrs. Komarr had just suffered a stroke and was seventy-five years of age.

"Mr. Beaudry's professional obligations were not discharged by the way he secured the drafting of this will even if he were not a beneficiary. It was Mr. Beaudry's duty to to provide an attorney, not a scrivener . . ."

The Wisconsin Supreme Court then went on to cite cases from Wisconsin and other jurisdictions to the effect that one who drafts a will without adequate counselling the testator is a mere scrivener and not an independent legal adviser and that advice which is incompetent, perfunctory or given without adequate knowledge of the testator's situation is not sufficient.

Also the following language at p. 154 of 53 Wis. (2) is most significant:

> ". . . When the attorney selected by the proposed attorney beneficiary is a close friend, the rule requires that attorney to meet all the tests for an independent legal attorney selected solely and exclusively by the testator himself. *See In re Lobb's Will* (1944), 173 Or. 414, 145 Pac. 2d 808."

This statement is highly important because it shows very clearly that the Wisconsin Supreme Court did not, as Petitioner contends, indulge in the presumption that an attorney friend to whom a matter such as this is referred cannot act in a competent, independent professional capacity.

The real test as the court made abundantly clear is whether the friendly attorney to whom the matter is referred does *in fact* act as an independent legal adviser by taking the proper steps in questioning the testator as indicated above and by drafting the will in the light of the information which he has independently ascertained rather than on the basis of the briefing he has received from the referring attorney.

Thus, we are dealing here with facts established by the evidence in the record and not on presumptions on matters *dehors* the record as Petitioner would like to believe.

III. The Findings Of Fact By The Wisconsin Supreme Court In An Original Action In That Court Are Not Subject To Review Here If Supported By The Record.

It is interesting to note that the constitutional points raised by the Petitioner were not raised during the hearing before the Referee nor in the Wisconsin Supreme Court prior to the entry of its judgment. It was only as a sort of afterthought that they come into the picture on Petitioner's Motion for Rehearing in the Wisconsin Supreme Court subsequent to its judgment and in an obvious attempt to raise federal questions upon which the Petition for a Writ of Certiorari could be bottomed.

Petitioner in effect is seeking a "trial de novo" here. He is not entitled to this.

The findings of the Wisconsin Supreme Court are fully supported by the evidence as disclosed by the record, and the proper rule to be followed by the United States Supreme Court in the review of attorney disciplinary proceedings was clearly stated by Justice Frankfurter in his dissent in the case of *In re Sawyer* (1959), 360 U.S. 622, 652, 79 S.Ct. 1376, 3 L.Ed. (2) 1473:

> "We are not empowered to set aside the conclusions of the Supreme Court of Hawaii, affirmed by the Court of Appeals, if its conclusions find reasonable support — that is, if conscientious judges could not unreasonably have reached such a conclusion on the strength of the evidence disclosed by the record and the inferences fairly to be drawn from it."

And later in the same dissent at p. 654:

"In examining this record sight must never be lost of the limited scope of our reviewing power. We are only concerned with whether the findings have fair support in the record. If the findings are so supported, we have the right to strike down the suspension only if it transgresses constitutional limits. . . ."

CONCLUSION

The Petition for a Writ of Certiorari herein discloses none of the controlling considerations set forth in Rule 19 for granting such a review, which is done not as a matter of right but only in sound judicial discretion and where there are special and important reasons therefor.

Such Petition should accordingly be denied.

Respectfully submitted,

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